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Industry Week

February 1, 1988

SECTION: FEATURES; Issues; Pg. 39

LENGTH: 3709 words

HEADLINE: SMOKING & DRUG POLICIES;

WHOSE RIGHTS?;

Over 40% of the nation's largest employers have drug-testing policies. Over 50% have smoking restrictions. Are they reaching too far into employees' personal lives?

BYLINE: By MICHAEL A. VERESPEJ

BODY:

What a worker does on his own time has always been his own business --- whether it be gambling, a night on the town, an overindulgence in alcohol or drugs, or a sexual liaison.

But all that's changing. In the last two years -- using employee health or workplace safety as the reason -- companies have begun restricting or banning smoking in the workplace and testing employees for drug and alcohol use. More than 40% of all large companies have drug-testing policies, and more than 50% have smoking policies -- both indirectly controlling employees' personal lives.

Companies such as GE, IBM, GM, Kodak, Du Pont, Union Carbide, and others are in effect telling employees: Do what you want, but if your life style affects your productivity or worker safety, or presents a health hazard, you'll have to change your ways.

(One exception: AIDS. In general, companies are treating AIDS as they would any other long-term illness and are making workplace accommodations for AIDS victims (see following story).)

To be sure, social pressure to control drug abuse and curb the suspected health hazards associated with smoking have made such policies acceptable. But there is little doubt that those admirable reasons aren't the real motivators for these new policies.

"Let's face it," says Donald Woodcock, a labor-law attorney for business with Calfee, Halter & Griswold, Cleveland, "altruism ranks third among the reasons why companies institute drug-testing or smoking policies. The first reason is a growing body of court decisions and state and federal legislation. The second reason is cost-effectiveness."

PRIVACY. As these policies spread, there's a growing concern about individual rights -- even though the constitutional right to privacy doesn't protect employees from the actions of a private employer.

Where do we draw the line, critics ask, between a company's prerogative to set workplace standards that their employees must meet and an individual's right to engage in whatever life style he chooses?

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That issue is particularly germane to drug testing because unlike alcohol, where there is a measured level of impairment, drug testing shows only recent use, not impairment.

"Because drug tests don't measure impairment, they go beyond what a person is doing on the job and open up a chemical window to an employee's life style off-the-job," says Ed Chen, an American Civil Liberties Union (ACLU) attorney in San Francisco. He has successfully halted several random drug-testing programs in California, including one at 3M's Camarillo plant.

"My concern is that this 'invasion' of rights will not stop with drug testing and smoking," says Arthur B. Spitzer, an ACLU attorney in Washington. "Once a company has your urine (from a drug test), it can test for other things — prescription medicines you may be taking, mental illness, or even genetic facts.

"If society's answer is that whatever testing is available is permissible, then we face an inevitable erosion of our privacy and our dignity," he says.

As the smoking issue illustrates, there can be intrusions even without testing.

But not everyone thinks the intrusions into worker rights will go beyond the current scenario. "I can't see employers being intrusive in other areas unless it relates to health and safety or cost factors," argues Calfee, Halter's Mr. Woodcock. "The reason drug-testing and no-smoking policies have emerged is that they have some validity to the operation of the business."

WORKPLACE IMPETUS. Business also argues that these issues have come to the forefront because it was workers or supervisors who perceived them as problems.

"We were reluctant to get involved in drug testing," explains Dr. Cliff A. Johnson, corporate medical director, The Goodyear Tire & Rubber Co. "But many of our plant managers told us that the only people applying for jobs were the 'druggies' that other firms had rejected." Du Pont had much the same experience.

Likewise, Goodyear's smoking policy was developed because of a growing number of complaints. "We had hundreds of employees writing letters to the CEO and complaining to managers and personnel officials," says Dr. Johnson. As a result, Goodyear now restricts smoking to designated areas in cafeterias or lunchrooms. In meeting areas, when a conflict evolves, the preference of the non-smoker prevails.

Goodyear has not switched as many others have to an outright smoking ban because its current policy works. "The complaints stopped overnight," Dr. Johnson says.

Goodyear's experience, says Stuart H. Bompey, an attorney with Baer Marks & Upham, New York, is fairly typical. Smoking and drug-testing policies, he argues, aren't a matter of companies' forcing their wills upon workers; they're "a reflection of society."

Already, 13 states and nearly 300 communities have laws requiring employers to regulate smoking in the workplace. "Employers are becoming more and more the enforcers of the public good and the means to enforce the mores of society," says Mr. Bompey. "Denying someone a job is the largest deterrent society has

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in dealing with these problems."

But therein, he says, lies "the rub. The more companies get involved in the private lives of their employees, the more conflict there will be."

LEGAL ISSUES/SMOKING. And both smoking policies and drug testing have kept legal eagles busy.

In the smoking arena, virtually all the legal decisions favor the non-smoker, says attorney Robert Fitzpatrick at Fitzpatrick & Verstegen, Washington.

While courts have been reluctant to impose smoking bans, they have ruled that companies need to take reasonable action to accommodate workers who are sensitive to smoke, and have ordered some firms to restrict smoking because of the common-law duty to provide a safe workplace. Other non-smokers have won unemployment compensation benefits on the grounds that their sensitivity to smoke "forced" them to quit their jobs, and they've won workers compensation benefits with the contention that workplace smoke caused their health problems.

(There is one case pending on behalf of a smoker alleging addiction to smoking and discrimination in hiring, but its chances of success are seen as slim.)

Possibly the stickiest legal problem with smoking policies is dealing with employees who can't quit. "You can't go and fire (them) because if they have been working for you for years, they would have some basis for an abusive discharge -- you've changed the work conditions," says Baer Marks' Mr. Bompey.

LEGAL ISSUES/DRUGS. In drug testing, legalities fall more into a mixed bag. In cases involving government workers, the courts have usually ruled that there is a need for just cause. And one recent case ruled that the drug test must show impairment, not just recent use.

Employees in the private sector -- who have no protected right of privacy -- have been able to mount successful challenges on other grounds: Wrongful discharge, no provable impairment, unilateral implementation without union bargaining, unlabeled samples, slander, disclosure of confidential information, or lack of just cause. And the two times that the issue of random testing has gone to a jury, the employee has pinned an expensive loss on business.

"There is no law against an employer's conducting drug tests," says Steve Yohay, an attorney with McGuiness & Williams, Washington. "But legal problems arise out of mistakes in administration -- how you do it, what you do with the results, or how the sample is collected, transported, or examined."

PERCEIVED NEED. Because of the legalities, the cost of implementation, and the employee-relations ramifications, drug-testing or smoking policies aren't for everyone -- even though they are the current vogue.

"You have to make sure there is a perceived need, and that you don't do it just because everyone else is doing it," says Dr. Bruce Karrh, vice president, health, safety, and environmental affairs at Du Pont.

In considering whether to test for drugs, the most important question companies should ask, says John Lewis, an attorney with Arter & Hadden,

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Cleveland, is WHY test? "A company needs to ask itself if there are any legitimate safety and health or productivity reasons to have a drug-testing program," he says. For example, are accidents occurring where there is evidence or suspicion that drugs or alcohol were involved? Is productivity falling off?

"Programs work best when there is a demonstrated rational basis to test," Mr. Lewis declares. "I'm an advocate of testing, but I also advocate asking the right questions and then making a business judgment on whether to get involved." Still, he advises, even if a company decides against drug testing -- as many prominent ones such as Wells Fargo Bank have -- it should let employees know that drug use anywhere on the property is prohibited.

STOP SMOKING. It hasn't been as easy to determine whether there's a need for a smoking policy. Even though statistics suggest that smokers in general are less productive than non-smokers, and that it makes economic sense to curtail workplace smoking, companies have had a difficult time concluding that there is a direct correlation between smoking and the productivity or safety of other employees.

That changed, however, when a December 1986 report from the U.S. Surgeon General warned of the potential health hazard from secondhand smoke.

But even with that evidence, most companies still wait to restrict or ban smoking until there are local smoking laws.

A case in point: Some 72% of the 50 companies surveyed by the Seattle-based Smoking Policy Institute in late 1987 developed policies only after they were required to do so by law. "Laws and court cases have forced some employers to act and scared others into it," says Arter & Hadden's Mr. Lewis.

The main reason companies are hesitant about developing smoking policies is that they approach it as "a social problem, not a health and safety problem," says Robert Rosner, executive director of the Smoking Policy Institute. "A lot of companies look at smokers and don't know how they'll adjust. They're leery of diving into it because it seems problematic."

RELUCTANCE. That's why when most companies first act they just prohibit smoking in common work areas or limit smoking to designated areas or private offices. In all, only about 10% of them have banned smoking.

That reluctance to ban isn't surprising.

"The disadvantages from the morale side outweigh the advantages on the other side," says Calfee, Halter's Mr. Woodcock. "Even non-smokers are reluctant to have their employer crowd out their smoking friends through what amounts to a constructive discharge."

Adds the ACLU's Mr. Spitzer: "If a company doesn't provide a time and a place for people to smoke, it would be shooting itself in the foot. It makes more sense to lose 30 to 40 minutes of an employee's time than to lose all of it."

Why do some companies shift to smoking bans? Some, like Honeywell, find that "employees were not cooperating and not confining their smoking only to designated areas," says Dr. John M. Burns, vice president, health and environmental resources, Honeywell Inc.

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But largely it's for financial reasons, says Washington attorney Mr. Fitzpatrick. Just as Pacific Northwest Bell didn't want to go to the expense of creating smoke-free rooms at its 750 locations, most companies, says Mr. Fitzpatrick, "don't want to have to spend dollars to accommodate smokers, maintain or clean up facilities, or create smoking areas."

Besides, by eliminating or restricting smoking in the workplace, "employers can significantly reduce health-care costs and negotiate lower life, health, and disability insurance rates," notes Dr. Leon J. Warshaw, executive director of the New York Business Group on Health. He estimates the cost to employers of having smokers on the payroll at anywhere between \$ 600 and \$ 4,600 per employee annually.

BETTER IDEAS? Given the increasing number of state and local smoking ordinances, and the growing number of court cases upholding non-smoker rights and labeling smoke as a health hazard, it's almost a fait accompli that most companies will have some sort of smoking policy in the near future.

But drug testing isn't that fixed in stone. Critics argue that testing doesn't get at the heart of the problem -- which is poor performance -- and they question whether there might be a less intrusive solution.

"The tests don't {measure} current performance," insists the ACLU's Mr. Spitzer, "which is what the employer should be concerned about." Weekend drug use, for example, doesn't necessarily mean Monday morning impairment. And he questions why industry doesn't use performance-based tests that check on an individual's ability to perform tasks.

"If a person can pass a physical-skills test, he should be able to perform on the job," says Mr. Spitzer. "And if he can't, then it doesn't make any difference what the cause is, unless it becomes repeated."

But companies argue that drug tests aren't any more intrusive than a blood test for marriage or an eye test for a driver's license. Besides, they say, skill tests wouldn't work -- practically or legally.

"We thought about alternatives, but we couldn't find any that accomplished our objectives," says Du Pont's Dr. Karrh. "We considered physical-skills tests, but we felt that those tests are very subjective and would be even more demeaning than a urine test if everyone was tested as he came on the job."

Another problem is that even though activities could be designed to test an individual's skills, "15 minutes later that worker could do some snorting," says New York Business Group's Dr. Warshaw. Besides, says Calfee, Halter's Mr. Woodcock, in a wrongful discharge contention "there is a burden on the employer to show that there was impairment of the worker's ability to perform his duties." And, without testing, the court will ask a company how it knew that drug use was involved.

HOLLOW RING? No matter how sound those arguments seem, they still ring with hypocrisy, say union officials.

"Are the same companies that advocate drug-testing or no-smoking policies engaged in programs of testing workplaces for exposure levels of toxic materials?". asks a spokesman for the AFL-CIO's Building & Construction Trades

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Dept. "Drug testing is just an easy way to avoid handling performance problems directly."

But Jim McGregor, a spokesman for Bath Iron Works -- a Bath, Maine, shipbuilder with a "for-cause" and random drug-testing policy that was hit with a record OSHA \$ 4.2 million fine for 3,000 (since contested) safety violations in November -- bristles at the suggestion that companies institute drug testing as an easy way out of handling performance problems.

"If I wanted to get rid of a person with a drinking or drug problem," says Mr. McGregor, who served as vice chairman of a state commission that studied the drug-testing issue, "the last thing I'd do would be test, because that person is going to ultimately self-destruct."

"I honestly believe that you are being humane as a company if you couple testing with the opportunity to get help," he declares.

TAILORING POLICY. If a company decides to proceed with drug testing or institute a smoking policy, is there any one type of policy that is most effective?

Probably not. "You have to tailor the policies to the nature of your workforce, and be consistent in whatever policy you choose," says Calfee, Halter's Mr. Woodcock. "If you do things indiscriminately, you can anticipate serious morale problems and being constantly barraged with and losing discrimination and discharge claims, especially if you have no evidence that the worker has not performed well."

In putting together a smoking policy, companies must decide where or whether they will let people smoke, how to designate areas for smoking, and how to help employees stop smoking, says Mr. Rosner at the Smoking Policy Institute.

But surprisingly, even though any smoking policy will mean that some employees -- usually 25% -- will have to change their personal habits or behavior, few companies bother to survey their workers.

"A lot of companies are just blundering through this," says Mr. Rosner. Less than one-third of the companies he asked had surveyed employees, 71% didn't notify their union, and 46% didn't even check their contract.

SURVEYS HELP. With a properly designed employee survey, argues Mr. Rosner, you can determine worker attitudes about smoking (is it harmful, is it a problem is there a right to smoke, are the employees bothered by smoke?), how they feel about different policy alternatives, where the resistance may be, and how many employees smoke.

Failure to survey workers, he believes, is why companies wind up changing their policies over time. Without such a survey, companies can't get a grip on the potential costs or the pitfalls. The other reason is that companies start "a ticking clock" when they restrict smoking. The reason? "To be successful even in restricting smoking, you have to convince employees that sidestream smoke is harmful. And if you do that, then the clock starts ticking to remove smoke as a health problem," Mr. Rosner observes.

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TESTING PRECAUTIONS. In drug testing a company must decide whom it wants to test, how to take the sample and get it tested, what to do with the results, and how to keep the results confidential. It also needs to be aware of the possible false positive readings that inexpensive drug-screening tests can give, and the need to confirm an initial positive test with a second, more accurate test using gas chromatography/mass spectrometry.

And if there's a union involved, you must bargain. The National Labor Relations Board ruled last September that drug testing for both employees AND job applicants is a "mandatory bargaining subject."

As a result, the most common approach is to test all job applicants, and to test current employees in high-risk or safety-sensitive positions, or "for cause," and to couple it with some company-sponsored rehabilitation program, says Arter & Hadden's Mr. Lewis. "Blanket random testing just creates too many employee morale problems and negative feelings about the company. And it isn't easy to justify in court." Besides, he says, employees will regard "for-cause" testing as unfair.

DIVERSITY. Yet, programs still vary widely. One Texas manufacturer simply dismisses anyone who tests positive under its random drug-testing policy (upheld by the courts because of a fire-at-will law that governs Texas employers). Others, such as Bath Iron Works, couple "for-cause" or "reasonable-suspicion" testing with provisions for random testing -- for up to one year -- of employees who test positive and then return to work after rehabilitation.

Goodyear Tire takes just the opposite view. "We don't think it does any good to do random testing," says the firm's Dr. Johnson. "You are not going to get at the root of the problem, and you are going to be testing a lot of people unnecessarily." (Less than 10% of job applicants test positive at most companies.) "We use drug testing as a last resort. It carries with it a risk and the stigma of poor employee relations."

Honeywell leaves testing of new job applicants -- by far the most prevalent form of drug testing -- to the discretion of the top supervisor at each of its 375 offices and manufacturing facilities. They can either test them all, test potential workers in safety-sensitive or high-risk positions, randomly test some of the samples, or test none, says Honeywell's Dr. Burns.

For current employees, there is only "for-cause" testing, and no employee is required to take a test against his or her will. If an employee refuses to authorize a drug test, "the supervisor would get a note to that effect from the medical department and then deal with the problem on a straight performance-management basis," Dr. Burns declares.

HOMEWORK. In the end, whether it's smoking or drugs, the success of a policy depends upon what kind of homework a company does before the program is launched.

"It is important in adapting any policy that restricts the freedom of employees that a company be able to justify it from a health and safety standpoint, or an economic basis, and that it find a way to preserve a worker's job rights," says Calfee, Halter's Mr. Woodcock.

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"Good management," he says, "will be able to sense what problems they'll confront, what obstacles they'll encounter, and where the concerns will arise."

TESTS AND ACCURACY IS IT RIGHT?

Not all drug tests and urine samples are created equal. In fact, the broad-spectrum tests that most companies use for their initial drug screening is the least reliable because it identifies only a broad class of chemicals. Thus, prescription and over-the-counter drugs can sometimes trigger a positive drug-use reading, says Dr. Jan Muczyk at Cleveland State University.

For example, poppy seed lovers and users of prescription codeine can test positive as users of opium, morphine, or heroin. Users of the over-the-counter analgesic ibuprofen -- found in Advil and Nuprin -- can be mistaken as marijuana users. The antibiotic Amoxycillin can produce a false positive reading for cocaine. And certain cold medications -- Contac and Sudafed -- can show up as amphetamine abuse.

Experts suggest the use of narrow-spectrum test that identify precise molecules of specific drugs if an initial screen is positive. The most foolproof method: the gas chromatography/mass spectrometry test which weighs each molecule separately.

The other problem with testing is guaranteeing the authenticity of the urine sample. There are numerous ways to beat the test -- "clean" samples sell on the street for less than \$ 50 -- and few companies actually witness the collection of the sample. The best safeguard: check the bottle for its warmth, color, and gravity immediately.

And it's not wise to give employees time to consider whether or not to take the test. Experts warn there are ways to "beat" the test.

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